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No. 99 -

IN THE

Supreme Court of the United States

ANADARKO PETROLEUM CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK R. HASKELL
BRUNENKANT & HASKELL, LLP
1450 G Street, N.W.
Suites 320 & 475
Washington, D.C. 20005
(202) 408-5953

CARTER G. PHILLIPS *
VIRGINIA A. SEITZ
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

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WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether the District of Columbia Circuit erred when it held, in conflict with the decisions of other courts of appeals and in irreconcilable tension with this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 839 (1984), that a federal agency (here the Federal Energy Regulatory Commission) lacks the discretion to limit retroactive relief based on traditional equitable considerations, even where the agency has established and is applying an entirely new rule of law in an adjudication and is exercising remedial discretion conferred by its governing statute.

2. Whether the District of Columbia Circuit erred when it held, in conflict with decisions of this Court, that a federal agency lacks the discretion to limit an award of prejudgment interest, even where the agency has established and is applying an entirely new rule of law in an adjudication and is exercising remedial discretion conferred by its governing statute.

LIST OF PARTIES AND AFFILIATES

The petitioners other than the ones listed in the caption are Amoco Production Company, Mobil Oil Corporation, OXY USA Inc., and Union Pacific Resources Company. The other parties in the proceedings below are listed in Appendix K.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the declaration of each of the petitioners is included in Appendix L.

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INTRODUCTION

Anadarko Petroleum Corporation, Amoco Production Company, Mobil Oil Corporation, OXY USA Inc., and Union Pacific Resources Company, petitioners herein, petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit.

In 1993, the Federal Energy Regulatory Commission ("FERC" or "Commission") decided that natural gas producers could not lawfully recover from consumers the amounts by which Kansas' *ad valorem* tax exceeded the maximum lawful price of gas,[1] expressly reversing the

[1] These amounts are hereafter referred to as the "excess Kansas *ad valorem* tax amounts" or "excess tax amounts."

1974 and 1986 determinations that they could do so. After FERC reversed itself, it confronted the separate, serious question as to the appropriate remedy for the producers' innocent—indeed, Commission-sanctioned—collection of such amounts. See *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 535 (1991) (Souter, J.).

Like many federal laws governing federal administrative agencies, the Natural Gas Policy Act ("NGPA") gives its administering agency, FERC, broad discretion to fashion appropriate remedies. See 15 U.S.C. §§ 3411(a) and 3412(c). Exercising that discretion in this case, FERC considered equitable factors—most notably the fact that it had abruptly departed from a longstanding rule that expressly authorized gas producers to collect excess Kansas tax amounts for 19 years—and ordered the producers to refund the excess Kansas *ad valorem* tax amounts, but only for the period from the date of its 1993 decision back to 1988, the date a D.C. Circuit decision first put gas producers on notice that the legality of their collection of the excess Kansas tax amounts was subject to doubt.

In 1996, the D.C. Circuit reversed FERC's decision to provide only partially retroactive relief. It did not defer to the Commission's contrary remedial judgment. Instead, it held, as a matter of law, that in exercising its remedial discretion, FERC could not consider equitable factors other than detrimental reliance. And, rather than remanding to FERC for the definition and application of that judge-made standard, the court of appeals itself defined detrimental reliance for the Commission in a crabbed and unnatural way, holding that the producers had not proved detrimental reliance, although they had collected excess Kansas tax amounts with Commission approval for 19 years, although they had necessarily made many business judgments as a function of the price that could lawfully be obtained for their product, and although they

had paid royalties and a tax-on-tax imposed by Kansas expressly because producers were entitled to recover these costs.

In addition, the D.C. Circuit's 1996 decision expressly held that FERC could not consider—as it had—the fundamental fairness of ordering a fully retroactive remedy as against parties who had acted innocently. Indeed, the court required FERC to order the producers to refund all excess Kansas tax amounts recovered since the date the first pleading was filed at the FERC in 1983 questioning the propriety of permitting producers to receive Kansas *ad valorem* tax reimbursements in addition to maximum lawful prices. The remedy imposed by the court of appeals in its 1996 decision resulted in hundreds of millions of dollars in total liability for the producers, plus prejudgment interest that far exceeded those amounts to be refunded. As one treatise explained, the D.C. Circuit's decisons apparently hold that an agency "can be *compelled* to make a change in legal rules retroactive in an adjudication." Davis & Pierce, Jr., *Administrative Law Treatise* (3d ed. Supp. 1999) (emphasis supplied).

The D.C. Circuit in its 1996 decision remanded the case to FERC. While pending on remand, petitioners here requested that FERC exercise its statutory discretion and waive the obligation to require payment of interest on the principal amounts to be refunded. FERC refused to consider exercising that discretion, concluding that the D.C. Circuit's 1996 decision prohibited the exercise of discretion by FERC, and that the D.C. Circuit's 1996 decision required that full retroactivity of the new rule, including full accrued interest, be ordered to be refunded.

On appeal of that FERC decision, the D.C. Circuit's 1999 decision affirmed FERC's understanding that FERC has no discretion to exercise its equitable, statutory

jurisdiction by waiving any interest on the principal amounts to be refunded.

The D.C. Circuit's 1999 decision is wrong. It directly conflicts with the decisions of other federal courts of appeals holding that, when a federal agency imposes an entirely new rule of law which represents an abrupt departure from clear past precedent, the agency has broad equitable discretion in fashioning a retroactive remedy for a violation of the new rule. Where, as here, a federal statute gives an agency broad remedial authority, the agency has the power to determine the extent to which a remedy for violation of such a new rule should be retroactive, and the agency's determination is entitled to *Chevron* deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984) ("*Chevron*"). But the D.C. Circuit's decision effectively precludes FERC from exercising the equitable discretion expressly granted to it by Congress in the NGPA. The D.C. Circuit decision also conflicts directly with decisions of this Court and general federal law holding that equitable factors other than detrimental reliance, including considerations of blameworthiness and agency delay, are relevant to an agency's decision whether to award prejudgment interest in a particular case.

The D.C. Circuit's erroneous decision wreaks havoc in an important area of federal law. It creates a specious exception to the general rule of *Chevron* deference when agencies interpret statutory provisions providing them with remedial discretion, because the decision effectively requires agencies to order full retroactive relief, including prejudgment interest, even when announcing a new rule that represents an abrupt departure from established precedent. As this case illustrates, the consequences can be devastating—hundreds of millions of dollars in unexpected liabilities imposed on parties for conduct that was

deemed lawful by the agency when it occurred. This is fundamentally unfair. The discretion that Congress gave FERC with respect to remedies—which is akin to the remedial discretion possessed by many agencies—should have allowed FERC both to state a new rule and to ameliorate any unfair consequences of its 180-degree rule reversal, but the D.C. Circuit has prevented FERC from doing so.

The consequences of the erroneous decision reach beyond this case. Any time an agency replaces an old rule with a new one in adjudication, the question of remedy—specifically the extent to which a retroactive remedy, including prejudgment interest, should be ordered —arises. Agencies with broad remedial authority conferred by statute believed that they had discretion with respect to retroactivity, but the D.C. Circuit has now held that they do not. The knowledge that they lack such discretion will inevitaby affect agencies' willingness to announce new rules in adjudication. Moreover, the D.C. Circuit reviews many agency decisions and has substantial influence beyond its bounds when it speaks on questions of administrative law, giving its erroneous holding a disproportionate effect. This Court should grant certiorari to decide whether a federal agency that annouces a new rule of law in an adjudication is entitled to *Chevron* deference when it orders only a partially retroactive remedy, including partial prejudgment interest, as a result of equitable considerations.

OPINIONS BELOW

The 1999 opinion of the court of appeals (Pet. App. 1a-14a) is reported at 196 F.3d 1264 (D.C. Cir. 1999). The Federal Energy Regulatory Commission's ("FERC's") decision (Pet. App. 40a-67a) is reported at 80 FERC ¶ 61,264 (1997), and its decision on rehearing (Pet. App. 15a-39a) is reported at 82 FERC ¶ 61,058 (1998).

An earlier opinion of the court of appeals in this case (Pet. App. 71a-102a) is reported at 91 F.3d 1478 (D.C. Cir. 1996). That earlier opinion reviewed a FERC decision (Pet. App. 116a-142a) reported at 65 FERC ¶ 61,292 (1993), and a FERC order denying rehearing is reported at 67 FERC ¶ 61,219 (1994).

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1999. On January 19, 2000, this Court granted petitioners' application to extend the time to file a petition for certiorari for thirty days, until February 28, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant provisions of the Natural Gas Policy Act of 1978 are reproduced at Pet. App. 163a-166a.

STATEMENT OF THE CASE

1. In 1974, FERC's predecessor, the Federal Power Commission ("FPC"), first prescribed nationwide maximum rates for producer sales of natural gas under the Natural Gas Act ("NGA"). See 15 U.S.C. §§ 717 *et seq.* The FPC, however, authorized producers to exceed those rate ceilings in order to recoup "all State or Federal production, severance, or similar taxes." *Just and Reasonable National Rates for Sales of Natural Gas,* 51 FPC 2212, 2301 (1974) ("Opinion No. 699"). Later that same year, the FPC held that producers lawfully could adjust gas prices to recoup the Kansas *ad valorem* tax, explaining that although the tax nominally was imposed on the value of mineral property, the tax was actually "based on production factors" and thus operated as a "severance or production tax." *Just and Reasonable National Rates for Sales of Natural Gas,* 52 FPC 915, 915 (1974) ("Opin-

ion No. 699-D"). The FPC's ruling expressly authorized natural gas producers to receive Kansas *ad valorem* tax reimbursements from their gas purchasers, in addition to receiving their otherwise applicable maximum rates.

In 1978, Congress enacted the Natural Gas Policy Act ("NGPA"). In that Act, Congress codified the FPC's regulatory treatment of state tax costs for natural gas producers. Specifically, section 110 of the NGPA provided that the sale price for natural gas could exceed the otherwise applicable maximum price to the extent necessary to recover "State severance taxes attributable to the production of . . . natural gas and borne by the seller." 15 U.S.C. § 3320(a)(1) (1988) (Pet. App. 163a).[2] Using language nearly identical to that employed in Opinion No. 699, Congress defined a "State severance tax" to include "any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas." *Id.* § 3320(c) (1988) (Pet. App. 164a). The legislative history of the NGPA, like its language, manifested Congress' intent to endorse the FPC's flexible application of Opinion No. 699. Relevant here, the Conference Report specified that the term "State severance tax" included "any tax imposed upon mineral or natural [gas] production *including an ad valorem tax*"—a clear reference to the FPC's treatment of the Kansas *ad valorem* tax. See H.R. Conf. Rep. No. 95-1752, at 91 (1978), *reprinted in* 1978 U.S.C.C.A.N. 8983, 9007 (emphasis supplied).

In accord with the language and purpose of section 110 of the NGPA, FERC thereafter incorporated the FPC's pre-NGPA regulatory principles—and, specifically, Opinion No. 699, the pre-NGPA ruling on the Kansas *ad*

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[2] Section 110 was repealed effective January 1, 1993, as part of Congress' decision to deregulate wellhead prices of natural gas. *See* Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, § 2(b), 103 Stat. 157, 158 (Pet. App. 159a).

valorem tax—into its post-NGPA analysis. In the years immediately following the NGPA's enactment, FERC twice relied on Opinion No. 699 in authorizing producers to recover other state taxes in excess of the ceiling price of gas under section 110 of the NGPA. See *Independent Oil & Gas Ass'n,* 7 FERC ¶ 61,094, at 61,143 (1979); *Trio Petroleum Corp.,* 18 FERC ¶ 61,203, at 61,412 (1982).

2. In 1983, Northern Natural Gas Company asked FERC to "reopen, reconsider, and rescind" Opinion No. 699 allowing natural gas producers to recover the Kansas *ad valorem* tax reimbursements, in addition to ceiling prices, and to rule instead that natural gas producers could *not* recover such amounts. FERC denied Northern Natural's request and reaffirmed Opinion No. 699. See *Sun Exploration & Prod. Co.,* 36 FERC ¶ 61,093 (1986) (Pet. App. 143a-156a). But, on review of that decision, the Court of Appeals for the D.C. Circuit held that FERC's opinion did not sufficiently articulate why the Kansas *ad valorem* tax qualified as a "severance, production, or similar tax" under NGPA section 110. The court accordingly remanded the matter to the Commission for further explanation. See *Colorado Interstate Gas Co.* v. *FERC,* 850 F.2d 769, 771, 774 (D.C. Cir. 1988) (Pet. App. 106a, 114a).

On remand, after a delay of five years, FERC changed course. It overruled its prior, directly contrary decisions and held for the first time that natural gas producers should not be allowed to recover the excess of the Kansas *ad valorem* tax amounts. See *Colorado Interstate Gas Co.,* 65 FERC ¶ 61,292 (1993) (Pet. App. 116a-142a), *reh'g denied,* 67 FERC ¶ 61,209 (1994). It is undisputed that FERC's 1993 decision rendered unlawful conduct that it had previously deemed entirely lawful.

The Commission then turned to the critical question of remedy. In assessing what remedy would be appropriate,

FERC explained that a key equitable factor was that natural gas producers had long possessed "settled expectations"—anchored in both the Commission's express prior rulings and in the language and legislative history of the NGPA—that they could recover the excess Kansas *ad valorem* tax amounts. *Id.* at 62,373 (Pet. App. 134a). Accordingly, in exercising its "wide latitude of discretion" in framing a remedy, FERC decided that the appropriate equitable balance was to award partially retroactive refunds, *i.e.*, refunds limited to the period after the D.C. Circuit's 1988 ruling put the producers on notice that the legal status of Opinion No. 699 was no longer secure. *Id.* (Pet. App. 134a-135a).

3. The matter then returned to the D.C. Circuit. The court of appeals affirmed FERC's new position on the Kansas *ad valorem* tax, but reversed the Commission's equitable decision that, as a remedy, it should order only partially retroactive refunds. The lone "crucial point," as the court "s[aw] the issue"—was the alleged "lack of detrimental reliance on the part of the producers." *Public Service Co.* v. *FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996) (Pet. App. 94a). The court held that, as a matter of law, FERC lacked the remedial discretion or the equitable power to limit the retroactivity of the refund order unless the producers demonstrated "detrimental reliance" on FERC's prior rulings. *Id.* (Pet. App. 94a-96a). Put differently, in the court's view, the alleged absence of detrimental reliance stripped the agency of all discretionary authority with respect to remedy. Incredibly, the D.C. Circuit believed that, had any party requested such relief, it would have been appropriate to order refunds of all excess Kansas *ad valorem* tax amounts that the producers had recovered since the NGPA's enactment in 1978. *Id.* (Pet. App. 94a-96a). But, because no party thought to preserve an argument seeking such draconian relief, the court held that "the producers' liability for re-

funds extends back to October 1983," *id.* (Pet. App. 95a-96a), the date FERC published notice of the petition challenging Opinion No. 699 in the Federal Register, *id.* at 1488 (Pet. App. 91a). This Court denied a petition for certiorari seeking review of the question whether administrative agencies are generally entitled to deference when they exercise discretion in formulating remedies.

4. The matter was again remanded to FERC. Petitioners invoked the Commission's procedures for making equitable adjustments to refund payments "as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens." 15 U.S.C. § 3412(c) (Pet. App. 166a). First, on equitable grounds, they sought a waiver of the prejudgment interest on the refunds of the excess Kansas *ad valorem* tax amounts for the period between October 1983 and June 1988. The Commission denied the request, explaining that the D.C. Circuit's decision in *Public Service Co.*, 91 F.3d at 1490 (Pet. App. 94a-96a), precluded the requested relief. See *Public Serv. Co.*, 80 FERC ¶ 61,264, at 61,952 (1997) (Pet. App. 52a), *reh'g denied*, 82 FERC ¶ 61,058 (1998) (Pet. App. 15a-39a). FERC next rejected claims that it should waive refund obligations attributable to an "add-on" component of the *ad valorem* tax that Kansas had imposed in anticipation that petitioners would be able to obtain reimbursement of the state taxes from petitioners' customers. *Id.* at 61,953 (Pet. App. 55a). Ignoring petitioners' obvious detrimental reliance on Opinion No. 699 in the payment of such taxes, FERC reasoned that the "producers should have filed any tax under protest once the petition was filed in 1983 questioning the continuing validity of the FPC's ruling on the Kansas tax." *Id.* (Pet. App. 55a).

In large part, the D.C. Circuit affirmed FERC's decision. *Anadarko Petroleum Corp.* v. *FERC*, 196 F.3d

1264 (D.C. Cir. 1999) (Pet. App. 1a-14a). The court first observed that prejudgment interest is awarded to make a party whole. It then explained that, although the causes of the enormous refund obligations were "[t]he Commission's legal errors and the snail-like pace of its administrative proceedings," *id.* at 1268 (Pet. App. 7a), FERC had rightly concluded that granting a waiver of prejudgment interest "would be inconsistent with the Court's mandate [in *Public Service Co.*, 91 F.3d 1478]." *Id.* (Pet. App. 8a):

> We there rejected the producers' equitable arguments against full refunds back to 1983, arguments the producers now repeat in support of their request for a generic waiver of interest regarding the same period. . . . In view . . . of our *Public Service* opinion, the Commission properly concluded that it should not grant a generic waiver of interest because, to do so, it would have to assess the equities in a manner contrary to *Public Service*. [*Id.* (Pet. App. 8a-9a)]

With respect to the request for relief from refunding the "add-on" component of the Kansas *ad valorem* tax, the court noted that "[o]ne of the curious features of the complex system by which Kansas taxed the production of natural gas was the way in which assessors 'grossed up' the value of the gas by approximately 10 percent to reflect the producers' ability to recover the Kansas tax at the time of sale." *Id.* at 1269 (Pet. App. 10a). This "grossing up" rested on the "false assumption that [producers] could recover the tax." *Id.* (Pet. App. 10a). The court agreed with FERC that, without regard to the fact that producers had relied on their ability to recoup the excess tax amounts and had " 'paid more *ad valorem* taxes to Kansas localities than they should have,' " the producers should nonetheless refund these amounts to con-

sumers. *Id.* (Pet. App. 10a). The court did not address whether Kansas had imposed, and the gas producers had paid, this tax-on-tax in detrimental reliance on the Commission's 1974 decision authorizing the recovery of the Kansas tax costs and hence did not consider whether it would support discretionary denial of a fully retroactive remedy.

REASONS FOR GRANTING THE PETITION

In words entirely apt in this case, Judge Friendly once explained that "the problem of retroactive application has a somewhat different aspect in cases not of first but of second impression, where an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry it regulates." *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966).

> Although courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct, a decision branding as "unfair" conduct stamped "fair" at the time a party acted, raises judicial hackles considerably more than a determination that merely brings within the agency's jurisdiction an employer previously left without, or shortens the period in which a collective bargaining agreement may bar a new election, or imposes a more severe remedy for conduct already prohibited. *And the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known, or might even had been taken in express reliance on the standard previously established.* [*Id.* (internal citations omitted) (emphasis supplied).]

In this case, two decisions of the Court of Appeals for the D.C. Circuit have imposed liabilities of hundreds of millions of dollars on natural gas producers for conduct that, at the time it occurred, was and had been for a decade or more expressly authorized by the Federal Energy Regulatory Commission ("FERC" or "Commission"). The issue in this case is the legality of the D.C. Circuit's 1999 decision reaffirming its 1996 decision, that the FERC has no discretion, in light of the equities, to order only partially retroactive relief, and holding instead that FERC was *compelled* to order a fully retroactive remedy for the gas producers' innocent—indeed, Commission-sanctioned—conduct in this case.

I. THIS COURT SHOULD GRANT CERTIORARI TO REVERSE THE D.C. CIRCUIT'S DECISION, REQUIRING A FEDERAL AGENCY WITH BROAD REMEDIAL DISCRETION TO AWARD FULL RETROACTIVE RELIEF IN THIS CASE AND REFUSING TO ACCORD THE AGENCY'S CONTRARY DECISION *CHEVRON* DEFERENCE.

This case presents the important question of the extent of a federal agency's discretion to limit retroactive relief based on equitable considerations when it establishes a new rule of law in adjudication and applies that rule retroactively. This question recurs virtually every time a federal agency abandons an old rule and announces a new one in adjudication, because most federal agencies have statutorily-conferred discretion with respect to remedies.[3] Petitioners submit that federal agencies with broad remedial authority have the discretion to decide that a party is not entitled to a full remedy in a retroactivity

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[3] Among the other statutes that give agencies remedial discretion are the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, the Federal Power Act, 16 U.S.C. §§ 791a *et seq.*, and the NGA, 15 U.S.C. §§ 717 *et seq.*

case. Where, as here, statutory language provides a federal agency with remedial discretion, that agency is entitled to *Chevron* deference in determining the extent to which retroactive relief is warranted and in defining and applying the equitable considerations that affect the appropriateness of full retroactive relief. We show below that the D.C. Circuit's contrary holding on this important question of law is wrong; that it conflicts with the decisions of other courts of appeals; and that it will have substantial, harmful consequences in administrative proceedings and in judicial review thereof. Accordingly, review of the issues in the context of this case is plainly warranted.

This Court has held that when a new rule of law is announced in an adjudication, it applies to the parties in that case. See *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993). But, once "a rule is found to apply 'backward,' there may then be a further issue of remedies, *i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one." *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 535 (1991) (Souter, J.). And, as this Court recently explained, when "a new rule of law [is applied] 'backwards,' " the kind of remedy that may be fashioned "depend[s]—like almost all legal issues —upon the kind of case, matter, and circumstances involved. Not all cases concerning retroactivity and remedies are of the same sort." *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 754 (1995).

In this case, a federal agency announced in an adjudication a new rule of law that represented an abrupt departure from the old rule. The old rule was that gas producers could recover the Kansas *ad valorem* tax amounts from gas purchasers, in addition to collecting the ceiling price; the new rule is that they cannot. Au-

thorized to do so by that old rule, gas producers for 19 years collected such amounts from their purchasers and made numerous other business judgments related to price. FERC applied its new rule retroactively to the parties in this case. But FERC initially correctly interpreted the NGPA to give it discretionary authority with respect to remedies and, more specifically, to give it discretion concerning the extent to which any remedy should be retroactive and the relevant equitable considerations to apply in making that decision.

Accordingly, FERC pointed out that its predecessor, the FPC, had held in 1974 that the excess Kansas tax amounts could be recouped by gas producers; that Congress had enacted in the NGPA in 1978 a provision nearly identical to the NGA provision that the FPC had applied to the Kansas tax; that in the legislative history of the NGPA Congress specifically anticipated that producers might recover excess *ad valorem* tax amounts under section 110 of the NGPA; and that in 1986 FERC had reaffirmed that the excess Kansas tax amounts were recoverable under that section. In light of all these facts, FERC initially determined that producers had lacked any notice that their collection of the excess Kansas tax amounts was unlawful until June 1988, when the D.C. Circuit issued its decision in *Colorado Interstate Gas Co.* v. *FERC*, remanding this matter to FERC for reconsideration of its decision that excess Kansas tax costs could be recovered under section 110 of the NGPA. As a result, exercising its statutorily-conferred remedial discretion, FERC ordered refunds to consumers retroactive only to 1988, the date it deemed producers first reasonably should have realized that the old rule of law allowing recovery of the excess Kansas tax amounts was subject to serious question.

In reviewing that Commission decision, however, the D.C. Circuit declined to accord any deference to FERC's

exercise of its remedial discretion. It appeared to believe that FERC was not entitled to deference on the question of remedy when applying a new rule of law retroactively. Instead, the D.C. Circuit held that the remedy afforded for retroactive application of a new rule of law must itself be fully retroactive absent detrimental reliance on the old rule of law. Further, the court established for the Commission an exceedingly limited definition of detrimental reliance and held that the gas producers had failed to prove it, although they had been authorized by FERC to recover the cost of the Kansas tax for 19 years, although they had necessarily made significant business judgments related to price based on their ability to recover such costs, and although they had paid royalties and a tax-on-tax imposed by Kansas on the express understanding that its cost could be recovered. See *Public Service Co.* v. *FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996) (Pet. App. 94a-96a); *Anadarko Petroleum Corp.* v. *FERC*, 196 F.3d 1264, 1268 (D.C. Cir. 1999) (Pet. App. 7a-9a).

The D.C. Circuit then remanded this case to the FERC. On remand, as a result of the D.C. Circuit's decision in *Public Service Co.*, FERC held that it was constrained both to order full refunds of the excess Kansas tax amounts recovered through October 1983 and to order full prejudgment interest to that same date. *Public Serv. Co.*, 80 FERC ¶ 61,264 (1997) (Pet. App. 40a-67a). The gas producers thus incurred additional liabilities for hundreds of millions of dollars for conduct that was expressly authorized by FERC when it occurred.

The D.C. Circuit's 1999 decision in this case, on appeal from FERC's decision on remand from the 1996 decision, for which certiorari here is sought, confirmed FERC's understanding—that FERC had no discretion

to waive the interest for the 1983-1988 refund period or otherwise to ameliorate full retroactivity.

Chevron instructs that, where statutory language is ambiguous, a federal agency charged with administering that statute is entitled to deference in interpreting that language. 467 U.S. 837, 842-44 (1984). Relevant here, FERC derives its remedial authority and discretion from the NGPA's general provision authorizing the Commission to "perform any and all acts . . . as it may find necessary or appropriate to carry out its functions" under the statute. See 15 U.S.C. § 3411(a) (Pet. App. 164a). In addition, the NGPA gives FERC the authority to make equitable adjustments to refund payments "as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens." *Id.* § 3412(c) (Pet. App. 166a). FERC initially reasonably interpreted these NGPA provisions to give it discretion with respect to remedy, and specifically to give it the authority not to order full retroactive refunds based on its judgment about the relevant equities arising from its abrupt departure from a clearly established rule. Later, after remand from the D.C. Circuit in 1996, FERC refused to consider exercising its equitable discretion to ameliorate interest, reasoning that it was prevented from doing so by the D.C. Circuit.

There is no exception to *Chevron* for statutory provisions relating to remedial authority. Pertinent here, the fact that an agency is applying a new rule retroactively does not deprive the agency of discretion with respect to remedy. Indeed, as one well-respected treatise states,

> [r]etroactivity seems particularly unfair when the effect is to impose a significant penalty on a party who had every reason to believe its actions were legal. Of course, *an agency can avoid this problem*

> *by exercising its discretion not to penalize, but simply to declare unlawful, conduct that the agency previously held permissible.* [II Davis & Pierce, Jr., *Administrative Law Treatise* § 13.2, at 246 (3d ed. 1994) (emphasis supplied).]

In accordance with *Chevron*, most of the courts of appeals have stated that they will defer to agency determinations, based on equitable considerations, not to make a remedy for violation of a new rule of law fully retroactive. See *Atlantic Richfield Co.* v. *United States Dep't of Energy*, 977 F.2d 611, 614 (Temp. Emer. Ct. App. 1992) (upholding new rule, but affirming the agency decision not to afford a full retroactive remedy, stating that the application of the new rule "does not entitle ARCO to the desired remedy of reallocating its costs for the applicable period"); *Laborers' Int'l Union* v. *Foster Wheeler Corp.*, 26 F.3d 375, 386 n.8 (3d Cir. 1994) (explaining why full retroactive remedy is not required when an agency announces and applies a new rule in an adjudication); *Transcontinental Gas Pipe Line Corp.* v. *FERC*, 998 F.2d 1313, 1323-24 (5th Cir. 1993) (upholding FERC's decision not to order $26 million in refunds upon an application of a new rule of law because "market circumstances [at the time the company acted] were confusing and . . . the Commission originally thought schemes like [the one ultimately found unlawful] were acceptable"); *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d 1053, 1066 (5th Cir. 1985) (upholding FERC's decision to order only partially retroactive refund under NGPA). Cf. *Southern Natural Gas Co.* v. *FERC*, 813 F.2d 364, 368 (11th Cir. 1987) ("the ultimate balance of equitable consideration is committed to the Commission's discretion") (quotation marks and alteration omitted).

In conflict with these decisions, however, the D.C. Circuit's 1999 decision, presented here for review, did not defer to FERC's determination that it would be profoundly unfair to order fully retroactive relief for a violation of the new rule announced and applied in this case. Instead, the court imposed and applied its own legal test for determining when a remedy that is only partially retroactive may be imposed. The D.C. Circuit reaffirmed that, in light of *Public Service Co.*, FERC lacked discretion to order only a partially retroactive remedy in this case and thus lacked discretion to limit the amount of prejudgment interest. *Anadarko*, 196 F.3d at 1268-69 (Pet. App. 8a-11a). In combination, the D.C. Circuit decisions of 1996 and 1999 in this case essentially foreclose any exercise of remedial discretion by FERC, despite the fact that Congress expressly granted FERC such discretion in the NGPA. See 15 U.S.C. §§ 3411(a) and 3412(c) (Pet. App. 164a, 165a-166a).

The harm that flows from the D.C. Circuit's decisions is substantial, and not only to the parties here who have incurred hundreds of millions of dollars in unexpected liabilities for blameless conduct. The D.C. Circuit is unique among the courts of appeals in that nearly three-quarters of its docket is made of suits which seek review of federal administrative agency practice. See, e.g., C. Tobias, *The D.C. Circuit as a National Court*, 48 U. Miami L. Rev. 159, 174-75 & n.90 (1993); J. Belcaster, *The D.C. Circuit's Use of the* Chevron *Test: Constructing a Positive Theory of Judicial Obedience and Disobedience*, 44 Admin. L. Rev. 745, 748-49 (1992); Smith, *Judicialization: The Twilight of Administrative Law*, 1985 Duke L.J. 427, 464-65. As a result, it is perceived as "an expert administrative judiciary . . ., although it is not officially recognized as such." P. Verkuil, *Cross-currents in Anglo-American Administrative Law*, 27 Wm. & Mary L. Rev. 685, 711 (1986). Due to the composi-

tion of its docket and its influence on other federal courts, the D.C. Circuit's determination—that *Chevron* deference should not be accorded to agencies' discretionary determinations that only partially retroactive relief should be awarded for violations of new rules and that only one, judicially-defined equitable factor is relevant in the remedial calculus—will have widespread, damaging consequences to regulated entities in all segments of the economy.

This Court should grant certiorari to decide whether federal agencies with statutorily-conferred remedial discretion are entitled to *Chevron* deference when they decide, based on equitable considerations, not to provide a fully retroactive relief in an adjudication announcing an entirely new rule of law.

II. THE D.C. CIRCUIT'S DECISION THAT FERC LACKED DISCRETION TO DECLINE TO AWARD FULL PREJUDGMENT INTEREST IN THIS CASE BASED ON TRADITIONAL, EQUITABLE FACTORS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

In this case, FERC concluded that the D.C. Circuit's decision in *Public Service Co.*, required it to award full prejudgment interest on the refunds ordered previously. The D.C. Circuit agreed that its prior decision bound FERC to do so, explaining that, as a matter of law, FERC could decline to award such interest only if the producers had proved detrimental reliance which, under the court's definition of detrimental reliance, the producers had failed to do. See *Anadarko Petroleum Corp.* v. *FERC*, 196 F.3d 1264, 1268-69 (D.C. Cir. 1999) (Pet. App. 8a-10a). This decision is wrong because, as explained above, it refuses to allow the Commission to exercise its discretion and make an appropriate remedial

determination delegated to it under the statute it is charged to administer. It also flatly conflicts with decisions of this Court and of other courts of appeals concerning the factors that are relevant to awards of prejudgment interest.

This Court recently declined to specify all the factors to be considered in "deciding under federal law whether to grant prejudgment interest," but did offer a list of factors taken from lower court cases "to demonstrate that the inquiry involves issues intertwined to a significant extent with the merits of the underlying controversy." *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 176 n.2 (1989). By way of example, this Court in *Osterneck* noted that a trial court deciding whether to award prejudgment interest would consider "whether prejudgment interest is necessary to compensate the plaintiff fully for his injuries, *the degree of personal wrongdoing on the part of the defendant*, . . ., whether the plaintiff delayed in bringing or prosecuting the action, and *other fundamental considerations of fairness.*" *Id.* at 176 (emphases supplied). See also *id.* at 177 (stating that the "factual and legal issues subsumed in the decision to grant discretionary prejudgment interest" include "the wrongfulness of the defendant's conduct and the plaintiff's full damages, as well as other matters of equity bearing on the merits of the litigation"). Thus, this Court reaffirmed its longstanding holding that "interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness." *Id.* at 176 (alteration omitted) (quoting *Blau* v. *Lehman*, 368 U.S. 403, 414 (1962)).

This Court has thus clearly held that "the degree of personal wrongdoing on the part of the defendant"—*i.e.*, the absence of any blameworthiness—is a relevant "con-

sideration of fairness" in assessing if, and how much, prejudgment interest should be awarded. And, in a case directly on point here, this Court denied prejudgment interest to a plaintiff precisely because the defendant which had wrongfully collected the payments at issue was innocent of any wrongdoing.

In *Board of County Commissioners* v. *United States*, 308 U.S. 343, 348-49 (1939) ("*Jackson County*"), Jackson County collected taxes from certain citizens based on the belief that it had a right to collect property taxes on the land in question. Some years later, it was discovered that, unbeknownst to the County, the land had been subsumed within an Indian reservation and thus was no longer properly subject to county tax. Jackson County was not informed, however, of this change. *Id.* at 352. This Court allowed the affected taxpayers a refund, but denied them prejudgment interest:

> The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. . . . Here is a long, unexcused delay in the assertion of a right for which Jackson County should not be penalized. By virtue of the most authoritative semblance of legitimacy under national law, the land of M-Ko-Quah-Wah and the lands of other Indians had become part of the economy of Jackson County. For eight years after Congress had directed attenion to the problem, those specially entrusted with the intricacies of Indian law did not call Jackson County's action into question. *Whatever may be her unfortunate duty to restore the taxes which she had every practical justification for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money*

> *which she could not have known was not properly hers.*
>
> Such is this Court's doctrine regarding the imposition of interest in cases where this Court has fashioned its own doctrine. [*Id.* at 352-53 (emphasis supplied).]

Moreover, the taxpayers argued (as did the affected consumers here) that they should not bear the burden of the government's failure to provide the defendant with the applicable legal rule. This Court rejected that argument:

> If it be said that the default of the United States should not be charged against its Indian wards, a choice has to be made between equally innocent victims of official neglect. . . . We think as to interest here, the loss should remain where it has fallen. If thereby Indians are out of pocket, they should not be made whole by putting Jackson County unfairly out of pocket. The appeal for relief must be made elsewhere. [*Id.* at 353.]

The Fifth Circuit—in conflict with the D.C. Circuit—has expressly recognized that FERC has the authority to deny interest when it orders refunds where the defendant was "not on notice" of the rule applied against it. *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d 1053, 1066 (5th Cir. 1985). This decision, like this Court's authority, recognizes that a defendant's blameworthiness is a relevant consideration when an agency is considering imposing substantial prejudgment interest based on a defendant's liability for conduct that was authorized by the agency when it occurred. See also *Wickham Contracting Co.* v. *Local Union No. 3*, 955 F.2d 831, 834 (2d Cir. 1992) ("[t]he relative equities may make prejudgment interest inappropriate when the defendant acted innocently and had no reason to know of the wrongfulness

of his actions") (citing *Jackson County*, 308 U.S. 343, 352-53 (1939)).

Similarly, an agency's egregious delay in issuing a decision is relevant to a determination of whether prejudgment interest is warranted. Indeed, the Fifth Circuit has held that "equitable considerations" forbid FERC from requiring a defendant to pay interest during a lengthy delay attributable to FERC itself. See *Estate of French* v. *FERC*, 603 F.2d 1158, 1167 (5th Cir. 1979). In that case, the court of appeals noted that French had voluntarily agreed to undertake refund liability with interest for the period from 1959 to 1971, when FERC finally determined the rate French could reasonably charge. But the court held that FERC could not order French to pay interest during the seven years FERC failed to decide whether French was entitled to a waiver of the interest for the twelve-year period because such a delay was unreasonable per se. *Id.* at 1167-68. Here, of course, FERC expressly allowed recovery of the Kansas tax costs for 19 years before changing course, and that fact is plainly relevant to any assessment of the equities of awarding full prejudgment interest. Cf. *General Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 657 (1983) ("undue delay" in prosecuting an action may make prejudgment interest inappropriate).

Thus, in deciding whether to award full prejudgment interest, federal agencies, like federal courts, may take equitable considerations—such as the innocence or lack of blameworthiness of the defendant and administrative error and delay—into account. That is so particularly where, as here, a federal statute gives the agency substantial discretion in the fashioning of appropriate remedies. See *supra* at 17.

In this case, in the first instance, FERC properly exercised its statutory discretion not to order a fully retro-

active remedy precisely because FERC had informed the producers that they were entitled under law to collect the excess Kansas tax amounts; because the producers had collected the amounts and made related business judgments based on FERC's decision for many years; and because the producers had entirely lacked notice until 1988 that FERC's decision might be subject to any question. These same considerations would plainly have supported a discretionary remedial decision not to award full prejudgment interest. But the D.C. Circuit prohibited FERC from exercising remedial discretion of any sort based on these factors. In light of the D.C. Circuit's decisions, FERC thus held not only that it was required to order a full refund, but also that it lacked discretion not to grant prejudgment interest, and the court of appeals affirmed that decision. See *Anadarko*, 196 F.3d at 1268-69 (Pet. App. 8a-11a).

The Court of Appeals was wrong. FERC had the discretion, conferred by the NGPA's provisions giving it broad remedial authority, to consider all equitable factors in determining whether to order full prejudgment interest in this case. The D.C. Circuit's decision that, as a matter of law, FERC lacked discretion to deny any prejudgment interest in the circumstances here conflicts with decisions of this Court and others laying out the equitable factors that may be considered in deciding whether to impose prejudgment interest.

As set forth above, the administrative law decisions of the D.C. Circuit are influential both because that court reviews many agency decisions and because other courts of appeals consider it to be expert in this area of law. Thus, the D.C. Circuit's decision that administrative agencies lack discretion with respect to prejudgment interest except where detrimental reliance, narrowly defined, is

shown will have a disproportionate and damaging impact. Accordingly, this Court should grant certiorari to restore to administrative agencies their full discretion to fashion appropriate remedies in adjudications where they announce new rules of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK R. HASKELL
BRUNENKANT & HASKELL, LLP
1450 G Street, N.W.
Suites 320 & 475
Washington, D.C. 20005
(202) 408-5953

CARTER G. PHILLIPS *
VIRGINIA A. SEITZ
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

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